

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Docket No.

74-2469

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES BRADLEY GRIFFITH
on behalf of himself and
all others similarly situated

VS.

RICHARD M. NIXON, individually
and as President of the United States,
Defendant
COMMITTEE FOR THE RE-ELECTION OF
THE PRESIDENT AND THE FINANCE
COMMITTEE TO RE-ELECT THE PRESIDENT,
Defendant-Appellees

Appeal from the United States District Court
for the District of Vermont
Honorable James S. Holden, Chief U.S.D.J.

DEFENDANTS-APPELLEES' BRIEF

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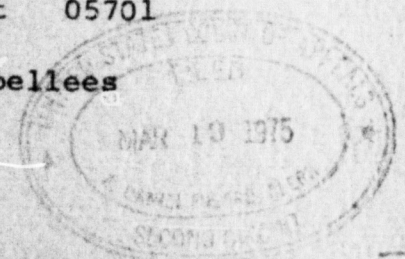


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STATEMENT OF THE CASE AND FACTS

On March 7, 1974 the Plaintiff filed a Complaint in the United States District Court for the District of Vermont asking the Court to declare the 1972 Presidential Elections null and void, and order new elections, order new primaries and order the inauguration of a newly elected President and newly elected Vice-President, etc. Further Plaintiff asked for compensatory and punitive damages, all by reason of alleged wrongful acts of the Defendants.

Defendant Richard M. Nixon did not appear.

Defendants Committee for the Re-election of the President, and the Finance Committee to Re-elect the President appeared and filed a Motion to Quash Summons and Dismiss the Complaint.

On July 22, 1974 a Motion by the United States Government, George W. F. Cook, United States Attorney, to appear amicus curiae was granted.

No testimony was taken and no Facts were found.

On September 27, 1974 the United States District Court for the District of Vermont, Hon. James S. Holden, Chief Judge, filed a Memorandum and Order saying:

1) Insofar as the Complaint requests a declaration that the 1972 presidential election is null and void and requests a new presidential election, it is dismissed for lack of jurisdiction, and

2) The remainder of the Complaint is dismissed for lack of proper venue.

(A foot-note states that the manner and method of service are not in accord with the provisions of Rule 4, Fed.R.Civ.P.)

ISSUES

1. Does the Complaint state a claim upon which relief can be granted?
2. Does the Court have jurisdiction?
3. Is venue proper?

ARGUMENT

I. NONJUSTICIABLE POLITICAL QUESTION

A. No cause of action under 42 U.S.C. Section 1985(3)

The Plaintiff filed a fifty page Complaint in the United States District Court for the District of Vermont stating that he and "all others similarly situated" seek a determination that the Defendants caused to be deprived, did conspire to deprive and did deprive the Plaintiff and others similarly situated of their right and privilege to "free elections" by committing and conspiring to commit "determinative informational irregularities (a form of election irregularity)" for the purpose of controlling the Presidential Election of 1972. The Plaintiff asked the Court to declare the Presidential Election and the Presidential Nominations in 1972 null and void, that the Court order that new Presidential Primary Elections be held, and that the Court order the Defendants to pay the Plaintiff compensatory and punitive damages.

The Plaintiff states that "this case arises under Title 42 U.S.C. Section 1985(3) * * *. (Page 2 of Complaint)

Title 42 U.S.C. Section 1985(3) provides as follows:

"Depriving persons of rights or privileges
(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy, in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In his Complaint the Plaintiff alleges "controlled elections" saying that the Defendants and their agents did conspire to unlawfully manipulate the "political - electoral -

nomination process of the Democratic Party to prevent the nomination of a strong Democratic Presidential candidate in 1972". Further, the Plaintiff alleges that the Defendants did conspire to prevent a Third-Party candidate from appearing on the ballot in the 1972 Presidential Election, that the Defendants conspired to prevent serious challenges within the Republican Party to Nixon's Presidential Nomination in 1972 and that the Defendants conspired to unlawfully manipulate the vote of the electorate in the 1972 Presidential Election through "informational irregularities". (Complaint Pages 4, 5)

Paragraphs 18 through 59 of the Plaintiff's Complaint claim alleged suppression, repression of information, espionage to acquire information, extortion and suppression of information.

Paragraphs 60 through 154 of the Plaintiff's Complaint claim an alleged "cover-up" of alleged wrongful acts.

Paragraphs 155 through 164 claim alleged "determinative irregularities" saying that the aforesaid informational irregularities "were of such significance that it is impossible to calculate, in retrospect, who would have been the party

nominee or who had won the Presidential Election, if some or all of the said information and irregularities had not been committed".

In Paragraphs 165 through 170 the Plaintiff claims the right to "free elections" and says that by reason of the alleged unlawful and unconstitutional "informational irregularities", aforesaid, the Defendants "did cause millions of votes to be mistakenly and wrongly cast for Mr. Nixon * * *". (Par. 168)

The Plaintiff claims that he himself has suffered damages in the amount of \$25,000.00 but does not specify the manner in which he sustained the same. (Par. 175)

The Plaintiff does not claim that he or anyone else was prevented from voting. The Complaint does not show that he was "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States * * *" within 42 U.S.C. 1985(3). The Statute has been applied to deprivation by intimidation of the right to register and to vote. Faynes vs. Lee, 377 F.2d 61, 64 (1967).

There are no cases which authorize the Federal Court to be the arbiter of disputes over whether particular Persons were or were not entitled to vote. Even in a Congressional Primary the Court will not intervene where it is alleged that some individuals were not qualified to vote under State law. Under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, the Court can intervene only where there are aggravating factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing the ballot box, or other unlawful conduct which interferes with the individual's right to vote. Pettengill vs. Putnam County R-1 School District, 472 F.2d 121, 122 (8th Cir., 1973)

No case is found where a Court granted relief where a voter was induced to vote or induced to fail to vote by reason of alleged false information disseminated by the candidate or by others in his behalf.

B. No common law right claimed or existing.

The Plaintiff does not claim that the Court should grant relief on the basis of the common law of any State.

Elections belong to the political branch of the Government, and, in the absence of special constitutional or statutory provisions, are beyond the control of the judicial power.

29 C.J.S. Elections, §246, Page 680.

The Court will not, for example, enjoin officials of a city from canvassing the returns and declaring the result of a certain election at which an ordinance was submitted to the voters on the grounds the ordinance is illegal or that the electorate has no power to adopt it. The Court will not interfere with the enactment of legislation. Relief in the Courts is available only where enforcement of void legislation threatens property rights. City of Dallas vs. Dallas Consolidated Electric St. Ry. Co., 105 Texas 337, 148 S.W. 292, 295 (1912)

In City of Dallas the Court said:

"Elections belong to the political branch of the government, and the general rule is that they are beyond the control of the judicial power. The authority resides in the courts to determine their validity, and in cases of invalidity to protect property rights which may be wrongfully impaired if their result is

suffered to become effective and is sought to be enforced; but a proper deference for their respective powers that is imposed upon the several departments of the government should constrain the courts to caution and certainty when their authority is invoked against the determination of the popular will. It should always be remembered that the separation of the great powers of government into different and distinctive departments, each independent in its own sphere and protected by constitutional limitations that neither can transcend but which all must respect, is the distinctive feature of our system, and its accomplishment is the fundamental fact of our history. The preservation of these powers in their full integrity and independence is a matter of common concern, for upon the freedom of their exercise depend alike public repose and private security, and neither will long endure if their abridgment be permitted or encouraged."

Action in the nature of quo warranto cannot be maintained except at the instance of the government and a private party does not have the standing to bring such a proceeding.

United States vs. Machado, 306 F. Supp. 995, 1000 (N.D. Cal., 1969)

C. Congress has ultimate supervisory power over Presidential elections

While Presidential electors are not officers or agents of the Federal Government they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The Congress undoubtedly

possesses every power essential to preserve the departments and institutions of the general government from impairment or destruction whether threatened by force or corruption. Burroughs vs. United States of America, 290 U.S. 534, 78 L.Ed. 484, 489 (1933). It cannot be seriously contended that Congress has less power over the conduct of Presidential elections than it has over Congressional elections. Oregon vs. Mitchell, 400 U.S. 113, 27 L.Ed.2d 272, 281, 91 S.Ct. 260 (1970)

D. Political question

Executive and legislative departments of the government are "the political" department. Propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. Oetjen vs. Central Leather Company, 246 U.S. 297, 62 L.Ed. 726, 732 (1917)

It is Defendants' position that Plaintiff's Complaint, his prayer for (1) removal of the President and (2) damages was properly dismissed in its entirety as a nonjusticiable political question on at least two grounds; (1) the removal of the President is constitutionally committed to the Congress and (2) the alleged wrong for which Plaintiff seeks damages does not lend itself to discoverable and manageable standards

for resolving it.

The Plaintiff prays that the Court declare that the 1972 Presidential election was null and void, that it order new national primaries, provide for the election and inauguration of a new President and Vice-President and declare the Defendant Richard M. Nixon an illegible candidate for such election. Clearly such a remedy is vested in Congress by virtue of Article II, §4 which states "the President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high kinds of misdemeanors". We quote the passage from Baker vs. Carr, 369 U.S. 186, 217, 7 L.Ed.663, 685 to which Honorable James S. Holden, Chief Judge, United States District Court for the District of Vermont, made reference to in his Opinion in this case;

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent

on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

This Court has recognized that a nonjusticiable political question outside of the power of the Court to review may exist in a case where there are no judicially discoverable or manageable standards for resolving it. DeCosta vs. Laird, 471 F.2d 1146, 1153 (2d Cir., 1973)

In the case at bar, in addition to asking the Court to remove the President, a remedy vested in the Congress, the Plaintiff has also asked for damages based on voluminous allegations of alleged "controlled elections", "informational irregularities", "cover-ups", "determinative irregularities", violating right to "free elections" without showing under what standards or what Federal Statutes Plaintiff should be

protected. Enunciation of those standards should come from Congress, not the Court.

E. Plaintiff lacks standing

The Court lacks jurisdiction over the President, but it is also clear that the Plaintiff lacks standing to maintain this action. The Plaintiff has alleged no injury to himself distinguishable from that of any other citizen. The Supreme Court has expressly rejected the standing of those who assert only "a general interest common to all members of the public". In *Ex Parte Levitt*, 302 U.S. 633, 634, 82 L.Ed. 493 (1937) the Plaintiff asked to have the appointment of Mr. Justice Black as an Associate Justice of the United States Supreme Court declared void. The Court said:

"The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

See also: Velvel vs. Nixon, 415 F.2d 236, 239 (10th Cir., 1969)

II. IMPROPER VENUE

Title 28 U.S.C. §1391(d) provides:

"(d) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law."

The Complaint alleges that jurisdiction is conferred by Title 28 U.S.C. §1343.

Title 28 U.S.C. §1343 provides:

"Civil rights and elective franchise
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The Complaint, Page 3, alleges that all the Defendants are residents of the City of Washington, District of Columbia. Since it appears that none of the Defendants reside in Vermont, venue could be proper only if the Plaintiff's claim arose in Vermont.

The Plaintiff's claim in his Complaint, Page 4, is that (1) the Defendants conspired to and did deprive the Plaintiff of his right to "free elections" under Title 42 U.S.C. §1985(3) and (2) did deprive the Plaintiff of constitutional rights by depriving the Plaintiff of "free elections". Although separately stated as "statutory" and "constitutional" the gravamen of the claim is the same, namely, violation of Title 42 U.S.C §1985(3).

The Plaintiff alleges only (Page 3 of the Complaint) that he is "a registered voter in the 1972 Presidential Election - is a citizen of the United States now residing in the County of Windham, State of Vermont". There is no allegation that he was registered to vote in Vermont or that

he did in fact vote in Vermont in 1972 or that he was deprived of his vote in Vermont in 1972. Therefore, the Complaint cannot be construed to allege that the Plaintiff's claim arose in the District of Vermont.

Plaintiff claims in his Brief (Page 26) that since Defendant Committee for the Re-Election of the President and the Finance Committee to re-elect the President are each an "unincorporated political organization" they may be sued in any district where they are "doing business" according to Rutland Railway Corporation vs. Brotherhood of Locomotive Engineers, 307 F.2d 21, 29 (2d Cir., 1962), but there are no allegations to show that these organizations were "doing business in Vermont".

For purposes of venue it may be found that one of the "residences" of an unincorporated association is that place where "it is doing business", Penrod Drilling Company vs. Johnson, 414 F.2d 1217, 1221 (5th Cir., 1969), but there must be such activities within the district as will satisfy the due process tenets of fair play and substantial justice, such as an office within the state, contracts or minimal contacts within the state. Redmond vs. Atlantic Coast Football League, 359 F.Supp. 666, 671 (S.D.Ind., 1973) There are no

allegations in the Plaintiff's Complaint of offices, agents or activities within the State and District of Vermont on the part of the Defendants.

Further, the venue Statute, 28 U.S.C. §1391(b) provides that the action may be brought only in the judicial district where all Defendants reside. There is no allegation that Defendant Richard M. Nixon resides in Vermont.

Since all of the Defendants do not reside in Vermont and since the claim did not arise in Vermont, the Complaint should be dismissed. Daugherty vs. Procunier, 456 F.2d 97, 98 (9th Cir., 1972)

Even assuming, arguendo, that the matter is an appropriate one for class action, venue is still improper. None of the venue statutes accord any different treatment to class actions governed by F.R.C.P. 23 than is accorded to non-class actions. Hence venue for class action under F.R.C.P. 23 is determined just as it is in a comparable type of non-class action.

3D Moore's Federal Practice, §23.96, Page 23-1901

CONCLUSIONS

1. The Complaint should be dismissed for failure to state a claim upon which relief can be granted.
2. Insofar as the Complaint requests a declaration that the 1972 Presidential Election is null and void and requests new Presidential Election, it should be dismissed for lack of jurisdiction.
3. The Complaint should be dismissed for lack of proper venue in the District of Vermont.

COMMITTEE FOR THE RE-ELECTION OF
THE PRESIDENT AND THE FINANCE
COMMITTEE TO RE-ELECT THE PRESIDENT

March 10, 1975.

By Robinson E. Kellogg
A Member of the Firm of
Ryan, Smith & Carbine, Ltd.,
Mead Building,
Rutland, Vermont 05701

ADDENDUM

Defendants-Appellees' Motion to Quash Summons and
Dismiss Complaint.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CHARLES B. GRIFFITH

vs.

RICHARD M. NIXON; COMMITTEE
for the Re-election of the
PRESIDENT; Finance Committee
to Re-Elect the PRESIDENT

)
)
) Civil Action 74-70
)
)
)
)

MOTION TO QUASH SUMMONS AND DISMISS COMPLAINT

NOW COMES the Firm of Ryan, Smith and Carbine and,
as attorneys for the Committee for the Re-election of the
President and the Finance Committee to Re-elect the President,
moves the Honorable Court to quash the Summons and dismiss the
Complaint against the above named defendants on the following
grounds:

- 1) The plaintiff does not possess standing to
maintain his action.
- 2) The plaintiff's Complaint presents a non-
justiciable political question.

- 3) The Court lacks jurisdiction over the defendants since no conduct or contact with the State of Vermont is alleged.
- 4) Service of process was not properly made on the defendant committees.
- 5) Venue is not properly laid in the District Court of Vermont since the action is based on an alleged conspiracy which contains no allegations of any overt act or conduct in the State of Vermont.
- 6) The individual claims alleged in the class action fail to meet the requisite jurisdictional amount of 28 USCA 1331.
- 7) The allegations fail to state a claim on which relief can be granted under 42 USCA 1985.

Dated at Rutland, Vermont this 24th day of May, 1974.

COMMITTEE for the Re-Election
of the PRESIDENT and Finance
Committee to Re-Elect the PRESIDENT

RYAN, SMITH AND CARINE, LTD.

By John J. Zawistoski
Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion to Quash Summons and Dismiss Complaint upon the plaintiff by mailing a copy of the same to Charles B. Griffith, pro se, Main Street, Box 463, Putney, Vermont 05436 and upon the United States of America by mailing a copy to Jerome F. O'Neill, Esq., Assistant United States Attorney, Post Office Building, Rutland, Vermont 05701.

Dated this 24th day of May, 1974

John J. Zawistoski
A Member of the Firm of
Ryan, Smith and Carbine, Ltd.

Docket No. 74-2469

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES BRADLEY GRIFFITH
on behalf of himself and
all others similarly situated

VS.

RICHARD M. NIXON, individually
and as President of the United States,
Defendant
COMMITTEE FOR THE RE-ELECTION OF
THE PRESIDENT AND THE FINANCE
COMMITTEE TO RE-ELECT THE PRESIDENT,
Defendant-Appellees

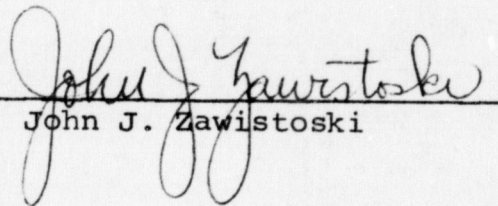
Appeal from the United States District Court
for the District of Vermont
Honorable James S. Holden, Chief U.S.D.J.

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of March, 1975
I served the foregoing Brief of Defendants-Appellees, by
mailing two copies of the same, postage prepaid, to Charles
B. Griffith, Main Street, Box 463, Putney, Vermont 05436 and

and upon the United States of America by mailing two copies
to Jerome F. O'Neill, Esquire, Assistant U. S. Attorney, Post
Office Building, Rutland, Vermont 05701.

Dated this 19 day of March, 1975.



John J. Zawistoski

